



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

QUASI-CONTRACTS—WAIVER OF TORT—ASSUMPSIT AGAINST ONE JOINT TORT FEASOR AS BAR TO TORT ACTION AGAINST OTHERS.—The defendants, officers of a corporation, acting for the corporation, converted the plaintiff's wheat to the use of the corporation. The corporation became bankrupt and the plaintiff proved his claim for the value of the wheat in the bankruptcy court. By this means he received payment in part. In the present action he claimed to recover from the officers for conversion of the wheat. *Held*, that by claiming in the bankruptcy proceeding the plaintiff had elected to "waive the tort" and could not thereafter recover in tort from any of the tort-feasors. *Shonkweiler v. Harrington* (1918, Neb.) 169 N. W. 258.

The decision is put by the court on the ground that having "collected from the corporation upon the implied contract to pay for the goods, he cannot afterwards allege against anybody that he did not sell the goods to the corporation." It is submitted that such a result is based upon a misunderstanding of our law relating to so-called "waiver of tort." The "implied contract" referred to was, under the common law system of pleading, merely a pleader's fiction, used for the purpose of giving a remedy in "assumpsit." Corbin, *Waiver of Tort and Suit in Assumpsit* (1910) 19 YALE LAW JOURNAL, 221. At the trial a tortious appropriation of the plaintiff's goods and a resulting enrichment of the defendant were the operative facts to be proved. Under modern code procedure these facts may, if the pleader desires, be stated without resorting to the fiction, although the old form may in many jurisdictions still be used. *Farron v. Sherwood* (1858) 17 N. Y. 227. Pomeroy, *Code Remedies* (4th ed.) sec. 431. Consequently, even if, as the court correctly maintains, proving the claim in bankruptcy was equivalent to obtaining judgment against the corporation in an action of "assumpsit" upon a "contract implied in law," this proves merely that the plaintiff elected to sue the principal wrongdoer in that "form of action." No authority need be cited for the proposition that joint tort-feasors in this country are liable severally as well as jointly. This being so, an election to sue one in one "form of action" can, as a matter of common sense, have no effect upon the right to sue another in some other "form of action." It is only by following a confused notion that the "implied contract" is something more substantial than a fictitious allegation of a pleader, an invention to give a plaintiff a remedy in "assumpsit," that some courts have been led astray. A question may perhaps be raised as to whether the liability in "assumpsit," as distinguished from that in "trover," is joint or joint and several. No authorities directly in point have been found. However, the cases uniformly hold that if some of the joint tort-feasors receive no benefit, they are not liable in assumpsit jointly with the others. *Minor v. Baldridge* (1898) 123 Cal. 187, 55 Pac. 783. On the other hand there are cases holding that the injured person may have a joint judgment when each of the wrongdoers receives a portion of the benefit. *Gilmore v. Wilbur* (1831, Mass.) 12 Pick. 120. These cases do not, however, determine that the liability is not also several, to the extent to which each tort-feasor is severally benefited. There seems no good reason why it should not be, once we recognize that the "implied contract" is a pleader's fiction. Cf. Woodward, *Quasi-Contracts*, sec. 289. Moreover, even if it were admitted that the "assumpsit" liability is joint solely, it would seem to follow, not that the tort actions were extinguished, but merely that no further assumpsit actions could be brought. Fortunately, the weight of authority on the precise point at issue seems to be against the conclusion reached in the principal case. Woodward, *Quasi-Contracts*, sec. 299. The case of *Huffman v. Hughlett* (1883, Tenn.) 11 Lea, 549, contains an exceedingly clear opinion in favor of the majority rule. The leading case supporting the view taken in the principal case is *Terry v. Munger* (1890) 121 N. Y. 161, 24 N. E. 272. For a searching criticism of that case, see Keener, *Quasi-Contracts*, 210.